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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940.

No. 1015 69

C. A. ROSS, AGENT, INC., a corporation of North Carolina, (amended by order of the Court to read ROSS MOTOR LINES, INC.),

Petitioner,

vs.

LOUIS VENUTO, Administrator ad Prosequendum and General Administrator of the Estate of ELVIRA VENUTO, deceased, and Administrator ad Prosequendum and General Administrator of the Estate of ANNA VENUTO, deceased, FLORENCE VENUTO, VITO CUOZZO and MARIE CUOZZO,

Respondents.

PETITION AND BRIEF IN SUPPORT THEREOF

CHARLES A. ROONEY,
Attorney for Ross Motor Lines, Inc., Petitioner.

SAUL NEMSER,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, THE CHIEF JUSTICE *and* ASSOCIATE JUSTICES *of the Supreme Court of the United States:*

Ross Motor Lines, Inc., the petitioner herein, respectfully presents its petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Third Circuit, which decision in the above case was rendered on March 14th, 1941, and affirmed judgments in favor of the respondents herein entered in the United States District Court for the District of New Jersey.

Summary and Statement of Matters Involved.

This case was brought by the plaintiffs against the defendants, Ross Motor Lines, Inc., and Lewis L. Robinson, to recover for personal injuries sustained to some of the plaintiffs and for the deaths of two of the plaintiffs' intestates as a result of a collision on a public highway in Linden, N. J., on July 3rd, 1937, by a motor truck owned and operated by Lewis L. Robinson and engaged in the haulage of interstate freight. The defendant Robinson was charged with direct negligence in the operation of his truck and the defendant, Ross, was charged with liability on the sole theory that it was the employer and master of the defendant, Robinson.

Ross set up the defense that Robinson was not its agent and servant and was, in fact, an independent contractor. The trial judge instructed the jury that if Robinson was an independent contractor, it must find in favor of Ross and submitted to the jury for its determination the sole question as to whether or not Robinson was the agent and servant of Ross. The jury found by its verdict that Robinson was the agent and servant of the defendant, Ross. The Circuit Court of Appeals found that the trial judge committed error in submitting to the jury the question of whether Robinson was the agent and servant of Ross, but held that the verdicts could be supported on the theory that although Robinson was an independent contractor, Ross was chargeable for his conduct upon a "vicarious liability" of an employer of an independent contractor.

This decision is at variance with precedence in the State of New Jersey, where the accident occurred, and also with deeply rooted precedence in the common law.

At the time of the accident and for some time prior thereto, both Ross and Robinson were duly authorized

common carriers by motor truck in interstate commerce, pursuant to the provisions of the Motor Carrier Act of 1935. At the trial of the action, judgments were returned in favor of the plaintiffs and against the defendants, from which judgments the defendant, Ross, appealed to the Circuit Court of Appeals for the Third Circuit, which court affirmed the judgments entered in the District Court.

This case involves the novel and important question as to whether a common carrier duly authorized by the Interstate Commerce Commission to engage in interstate commerce by motor truck, in availing itself of the services of another common carrier duly authorized by the Interstate Commerce Commission to transport goods received by the first carrier, thereby assumes full responsibility to the entire world for actions arising out of accidents on the public highway involving the second carrier's vehicles, although the second carrier is, admittedly, an independent contractor and not the agent and servant of the first carrier.

This question is of great moment not only to the authorized motor truck carrier of the merchandise, but it has far-reaching consequences as to the liability of the insurance carrier of the original motor carrier, inasmuch as the Motor Carrier Act of 1935, 49 Stat. 557, 49 U. S. C. A. 315, imposes absolute liability upon the insurance carrier for accidents arising out of the operation of the assured named in the policy, and the insurance carrier, if the holding for which review is sought be not reversed, would thus have imposed upon it vast and ruinous liabilities which it could not anticipate in fixing its rates.

It also involves the important question as to the general liability of an independent contractee for the negligence of an independent contractor; and it further involves the question whether the Circuit Court of Appeals has the right to affirm the judgments of the District Court on a

theory entirely outside the scope of the pleadings and the issues submitted to the jury and upon a ground which was expressly eliminated from the jury's consideration by the trial court.

At the trial motions were made for nonsuit and direction of verdict and the appeal to the Circuit Court of Appeals was based upon the denial of those motions as well as errors in the charge of the trial court, denial of request of the defendent, Ross, to charge the jury, and the rulings of the trial court on questions of evidence.

We are also here concerned with rulings in the trial court and the appellate court, which prejudiced the substantial rights of the defendant, Ross. Ross in the pleadings was charged with being the master of Robinson in a relationship allegedly based upon a common law and not a statutory obligation, although the trial judge, over the objections of counsel for Ross, permitted testimony to be submitted as to statutes and rules of the Interstate Commerce Commission in support of the plaintiffs' case, entirely at variance with the issue and the pleadings, thus confronting it at the trial, over objection of its counsel, with a new issue outside of the pleadings. The Circuit Court held that such proof was not required to sustain the verdicts but, thereafter, in its own opinion cites the proof submitted at the trial by way of rules and statutes to support its own holding.

There must be some reasonable control of proof within the pleadings even under the existing liberal construction of the rules so as not to require a defendant to meet an issue of which it had not been apprised prior to the trial.

Basis of Jurisdiction.

This action was originally instituted in New Jersey Supreme Court, Essex County, and was removed on application of defendant, Ross, to the United States District Court, District of New Jersey, upon the ground that the petitioner was a citizen of the State of North Carolina and the plaintiffs were citizens of the State of New Jersey, and the amount in controversy exceeded $3,000.00, exclusive of interest and costs. Jurisdiction in such cases is conferred upon the Federal District Courts by the Judicial Code, section 28, amended (28 U. S. C. A. 71).

Petition herein for writ of certiorari is made under authority of the Judicial Code, section 240, amended (28 U. S. C. A. 347).

Questions Presented.

1. Whether the defendant, Ross, was liable for the negligent acts of Robinson, who was admittedly an independent contractor under the novel theory of "vicarious liability" as expounded by the Circuit Court of Appeals.

2. Whether the defendant, Ross, under the facts in this case, was liable for the negligence of Robinson, an independent contractor, where both Ross and Robinson were duly licensed carriers of interstate freight by the Interstate Commerce Commission pursuant to the Motor Carrier Act of 1935.

3. Whether the Circuit Court of Appeals for the Third Circuit committed error in affirming the judgments below upon a theory entirely outside of the scope of the pleadings and outside of the issue presented to the jury.

Reasons Relied on for Granting the Writ of Certiorari.

The reasons relied on by the defendant, Ross, for the granting of certiorari are that:

1. The Circuit Court of Appeals for the Third Circuit has decided an important question of local law in conflict with applicable local decisions.

2. The Circuit Court of Appeals of the Third Circuit has decided an important question of federal law, which has not been, but which should be, settled by this court.

3. The Circuit Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision.

Wherefore, your petitioner respectfully prays that a writ of certiorari may issue to the Circuit Court of Appeals for the Third Circuit to review its judgment affirming the judgments of the United States District Court for the District of New Jersey.

CHARLES A. ROONEY,
Attorney for Ross Motor Lines, Inc.,
Petitioner.

SAUL NEMSER,
Of Counsel.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement.

This is an application for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Third Circuit, affirming judgments in the United States District Court for the District of New Jersey.

The Opinion of the Court.

The opinion of the Circuit Court of Appeals for the Third Circuit was filed on March 14th, 1941 (R. p. 1, opinion). It has not as yet been officially published nor does it as yet appear in the advance sheets of the Federal Reporter.

Statement of Grounds of Jurisdiction.

The grounds upon which jurisdiction is invoked have been summarized in the petition.

Statement of the Case.

The statement of the case sufficient to cover the legal points involved has been set forth in the petition for the writ of certiorari.

Specification of Assigned Errors.

POINT I.

The Circuit Court of Appeals erred in holding the defendant, Ross, was liable under Common Law, under the theory of vicarious liability for the negligent acts of Robinson, an admittedly independent contractor.

The Circuit Court of Appeals properly held that in determining the rules of liability arising from the relationship of the parties, the law of New Jersey governs (R. p. 5, opinion). The Circuit Court of Appeals having found that the relationship of master and servant did not exist (R. p. 4,

opinion) but that a relationship of independent contractor and independent contractee did exist between the defendants, it is essential in discussing this case from a common law standpoint of liability to determine what the law of New Jersey is and whether it has been definitely crystallized through judicial determination.

The unquestioned law of New Jersey with reference to liability of an independent contractee for the negligent acts of an independent contractor has been laid down repeatedly by the Court of Errors and Appeals of New Jersey. The rule is that an independent contractee is not liable for the negligent acts of an independent contractor unless the work to be done in the ordinary mode of doing it is a nuisance or is inherently dangerous or the contractee fails to exercise due care in selecting a skillful or proper person as an independent contractor.

In the case of *Cuff* vs. *Newark & New York Railroad Co.*, 35 N. J. Law 17 (1870), the New Jersey Supreme Court held that the rule was firmly established that when the work is in itself not a nuisance and is being done by a contractor exercising independent employment in employing his own servants and the injuries result from the contractor and his servants in the execution, the contractor alone is liable.

In the case of *Reisman* vs. *Public Service Corporation*, Court of Errors and Appeals, 1911, 82 N. J. Law 464, 81 Atl. 838, the plaintiff had been struck and injured by a rocket set off during an exhibition of fireworks at a pleasure resort owned and controlled by the defendant traction company, which as a part of a flat charge conveyed passengers to the park and admitted them. The fireworks were set off under the direction of one Romain, under contract with the defendant, and it was fully proved that Romain and his employees were uncontrolled as to the

manner of doing the work, except that the time and place, when and where the fireworks were to be set off, were fixed by defendant. The arrangements for witnessing the exhibition were controlled by defendant's servants, who kept the spectators at a distance of from three hundred to four hundred feet away from the place of setting off the fireworks, and on the other side of a sheet of water. It was held that Romain was an independent contractor, and that for any negligence of himself or his servants in setting off the rocket, defendant was not responsible. The court, speaking through Parker, J., at page 466 said:

> "As to the negligence, if any, in discharging the rocket, there is no direct proof, and the claim must be based on the maxim res ipsa loquitur. But, as we have already seen, any claim on this score is disclaimed; and if it were not, still it could not avail, because the negligence, if any, was that of an independent contractor. The argument seems to be that notwithstanding the uncontradicted proof showed that Romain was employed as a fireworks expert for a lump sum to set off certain designated fireworks on defendant's property, and was not controlled in any way by defendant or its agents as to the method and details of his work, except the place and time of its performance, and that none of the employes of the defendant had anything to do with setting off the fireworks, and their duties were confined to keeping the crowd back, nevertheless, this co-operation in the management of the entertainment made Romain a servant and not an independent contractor.
>
> "In *26 Cyc. 1546,* an independent contractor is defined to be one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. The evidence for the plaintiff brought Romain

> fully within the definition just quoted, and which we deem adequate for the purposes of this case. It follows, therefore, that for any negligence of himself or his own employes in setting off the fireworks, the defendant is not responsible."

The common carrier in this case was carrying out a franchise obligation in conveying its passenger, the plaintiff, to its own amusement park, entertaining him there and then returning him on its own trolley car. We are thus met in that case with a question of continuing relationship between the company and this passenger under its franchise rights. There we had a much stronger case from the plaintiff's viewpoint than the case *sub judice;* and if New Jersey were to recognize the novel theory of "vicarious liability" this is one case where it would certainly have enforced it.

In the case of *Sarno* vs. *Gulf Refining Company,* New Jersey Supreme Court, 1923, 99 N. J. Law 340, 124 Atl. 145; aff. 102 N. J. Law 223, the defendant leased to the owner of a garage in Jersey City a gasoline tank. In March, 1921, the garage owner requested the defendant to remove the tank and pump and the defendant employed for that purpose, one McKillop, a licensed plumber of Jersey City, to perform the work of removal, which the latter undertook to do by sending his workman to the premises for that purpose. The workman excavated the street under a permit from the city, granted to the contractor for the purpose. The infant plaintiff, while the work was progressing, incidentally stepped upon a manhole cover, when an explosion took place beneath him and drew the boy into the burning manhole, where he suffered severe injuries. The court said at page 342:

"The contention of the plaintiff is that the work of removing the tank, under the circumstances, was inherently dangerous and tantamount to the existence of a nuisance, from the effect of which in its dangerous transmission the defendant could not legally absolve itself, by contracting the work out to another, citing *Cuff* v. *Newark and New York R. R. Co.*, 35 N. J. L. 17, and other cases in this and other jurisdictions illustrative of the correctness of that general principle. The difficulty in the application of that conceded rule of law to the case at bar is that we do not find in the case any evidence from which it can be reasonably inferred that the work of removing this tank was per se a nuisance, as was clearly established in such cases as *McAndrews* v. *Collier*, 42 Id. 180. * * *

"The question presented for legal solution in the situation is the legal relationship which existed between McKillop and the defendant in the performance of the work of removal. The rule is established beyond question, by innumerable authorities, that if the legal status of McKillop was that of an independent contractor, he alone and not the defendant is liable for the faulty or negligent execution of the work of removal."

In the case of *Mann* vs. *Max*, Court of Errors and Appeals, 1919, 93 N. J. Law 191, 107 Atl. 417, the owner of land abutting on a public street employed a contractor to build a building thereon. The contractor employed a subcontractor for the mason work, and the latter in prosecution of his work erected scaffolding projecting over the sidewalk against which plaintiff, passing at night, struck his head and was injured. It was held that no liability of the owner was shown, neither the work nor the scaffold being in itself a nuisance, and both being under control of a contractor exercising an independent employment. The court through Parker, J., said at page 193:

"A reasonable and proper scaffold being permissible, it was presumably lawful for the mason con-

tractor to erect one; and a scaffold would not be under the circumstances a nuisance per se, but, as we have said, a legitimate appliance for building purposes. And the rule is thoroughly settled that where one employs a contractor exercising an independent employment and hiring his own servants to do a work not in itself a nuisance, the contractor alone is liable for an injury resulting from the negligence of himself or his servants, unless the employer is in default in selecting an unskillful or an improper person as contractor."

To the same effect are the following cases:

McGuire vs. *Grant,* 25 N. J. Law 356;
Otmer vs. *Perry,* 94 N. J. Law 73;
Giroud vs. *Stryker Transportation Co.,* 104 N. J. Law 424;
Courtinard vs. *Gray Burial & Cremation Co.,* 98 N. J. Law 493;
Busch vs. *Seaboard By-Products Co.,* 100 N. J. Law 304;
Lacombe vs. *Cudahy Packing Co.,* 103 N. J. Law 651;
Gilbert vs. *Junior Trucking Corp.,* 104 N. J. Law 608;
Johnson vs. *American Oil Co.,* 110 N. J. Law 456.

In the instant case there were no allegations or suggestions that Robinson was an improper or unfit person to operate a motor vehicle, nor was there any allegation or proof that the work of Robinson itself was either a nuisance or was inherently dangerous.

In the case of *Wilson* vs. *Brauer,* 97 N. J. Law 482, 117 Atl. 699, the Court of Errors and Appeals of the State of New Jersey in an opinion by Mr. Justice Trenchard stated at page 484:

> "It is true, we believe, that automobiles are not generally held to be dangerous instrumentalities per se. Certainly when carefully and intelligently handled, they are not usually dangerous to other persons using public highways with due care."

It is only where automobiles are handled by improper and incompetent persons that they may become a dangerous instrumentality. Under the New Jersey decisions, therefore, there is no doubt but that Ross under the pleadings, proofs and issue in this case, should have been entitled to a direction of a verdict.

In the case of *Fidelity Union Trust Company* vs. *Field*, 85 L. Ed. 176, the United States Supreme Court held that the Circuit Court of Appeals for the Third Circuit must follow the decisions of the state court of New Jersey and the federal court was not to undertake a determination of a question of state law by its own reasoning.

See also:

Moore vs. *Illinois Central Railroad Co.*, 85 L. Ed. 722; and

Erie R. R. Co. vs. *Tompkins*, 304 U. S. 64; 59 S. Ct. 229, 82 L. Ed. 1188.

In the instant case the Circuit Court of Appeals in affirming the judgment below, decided the question of the defendant Ross's responsibility in direct conflict with the applicable local decisions. It held that there was vicarious liability resting on Ross for the acts of the independent contractor Robinson. In New Jersey a defendant cannot be vicariously liable for the act of another not his agent or servant; his negligence, where the relationship of master and servant does not exist, must be absolute and must either arise from the careless selection of an improper independ-

ent contractor or because of the inherent danger of the work or because the work is a nuisance per se.

See *Courtinard* vs. *Gray Burial and Cremation Co., supra*, at page 496, where the court held:

> "Fundamentally as we have demonstrated in subsequent cases, the theory of master and servant, like that of principal and agent is based upon the legal conception of a representation in a chosen and accepted line of service, by which the employe practically becomes, for that particular duty, the alter ego of the master. It becomes manifest, therefore, that the vicarious responsibility of a third party for injury resulting from a negligent act of another, can be legally or logically supported upon no other recognized conception."

POINT II.

The Circuit Court of Appeals erred in holding that the defendant, Ross, was liable for the negligence of the defendant, Robinson, an independent contractor, where both Ross and Robinson were duly licensed carriers of interstate freight by motor vehicle, by the Interstate Commerce Commission pursuant to the Motor Carrier Act of 1935.

Although the Circuit Court of Appeals held that the basis of the plaintiffs' claim rested on common law responsibility (R. p. 2, opinion), it apparently considered the Motor Carrier Act of 1935 as a statutory authority for enlarging the common law liability of an independent contractee for the acts of his independent contractor (R. p. 5, opinion). It held that "the carriage of freight in high powered motor vehicles on public highways is certainly attended with very considerable risk" (R. pp. 5, 6, opinion) and quoted with approval the rule as stated in the Restatement of Torts, paragraph 428:

> "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity" (R. p. 5, opinion).

The Circuit Court of Appeals apparently overlooked the fact that the defendant Robinson, who was the owner and actually operating the truck at the time of the accident, was a duly authorized common carrier (R. p. 64, and Ex. O. 7, p. 178 of Sup. App.), and also overlooked the fact that in New Jersey, as shown above, an automobile is not essentially a dangerous instrumentality. In further support of its opinion, the Circuit Court of Appeals relied upon the authority of *Duncan* vs. *Evans,* 134 Ohio State 486; 17 N. E. (2nd) 913; 20 N. E. (2nd) 729; 60 Oh. App. 265; and *Bates Motor Transp. Lines, Inc.* vs. *Mayer,* 213 Ind. 664; 14 N. E. (2nd) 91.

The case of *Duncan* vs. *Evans, supra,* is not in point. In that case the court relied upon an Ohio statute which expressly covered the situation involved. The court also found in that case that the relationship of independent contractor did not exist. Further, and of great importance, is the fact that in that case the operator of the truck was not authorized and bonded as required by the state law—a different situation than we have in the case *sub judice.*

The *Bates* case is no authority for the rule enunciated by the Circuit Court; in fact, the *Bates* case is to the contrary and supports the position of the petitioner herein, indicating that if the operator of the vehicle had obtained a license under the state act, he would have been an independent contractor, but in the absence of such license, he could not be considered an independent contractor.

The question involving the right of a licensed public carrier to engage as an independent contractor another person also authorized by the Interstate Commerce Commission, has never been passed upon by this court. One of the main purposes of the act is to assure protection to the public against injuries sustained by operation of motor trucks engaged in interstate commerce.

It must be assumed that the defendant, Robinson, by reason of his license by the Interstate Commerce Commission, was possessed of the necessary mechanical knowledge, experience and financial responsibility to perform his work as a common carrier so that the main purpose of the act was fully effectuated, when the defendant, Ross, an authorized common carrier engaged as an independent contractor the defendant, Robinson, also authorized.

In the case of *Sarno* vs. *Gulf Refining Company, supra,* the defendant owner of a garage was held not liable for the negligence of an independent contractee in removing a gasoline tank when an explosion took place injuring the plaintiff. The independent contractor was a plumber licensed by the City of Jersey City and the court said, at page 342:

> "McKillop, the plumber licensed by the city for the purpose, we must assume, was possessed of the necessary reasonable mechanical instrumentalities for the performance of the work, as well as the necessary experience incident to his calling, and was not, in the absence of affirmative proof to the contrary, an improper person to whom to entrust the work of removal. The burden of proving his unfitness, or the impropriety of employing him for the work under the circumstances, was upon the plaintiff, and the case seems to be devoid of such proof."

POINT III.

The Circuit Court erred in affirming the judgments below upon a theory entirely outside of the scope of the pleadings and outside of the issue presented to the jury.

The basis for liability in this case was predicated solely upon the theory that the defendant Robinson was the agent and servant of the defendant Ross and that, therefore, Ross was chargeable under the doctrine of *respondeat superior*. The District Court judge in charging the jury, left it to the jury to decide whether or not the relationship of master and servant existed as between the defendants Ross and Robinson (R. p. 12, appendix to brief of appellant). It further charged as follows:

> "However, if you find that Lewis L. Robinson was an independent contractor, then you should find in favor of Ross and assess damages against Lewis L. Robinson only."

The Circuit Court of Appeals in its opinion held that the lower court was in error in leaving to the jury the question of relationship of master and servant and held that Robinson was an independent contractor (R. p. 4, opinion). In spite of this holding, the Circuit Court of Appeals held that the defendant Ross was liable for the vicarious acts of the independent contractor (R. p. 7, opinion), although this question was utterly beyond the scope of the pleadings and of the issue submitted to the jury.

We respectfully maintain that the Circuit Court of Appeals had no authority to decide *de novo* the case on an issue which was not raised by the pleadings nor submitted to the jury.

In the case of *F. W. Woolworth Co.* vs. *Carriker*, 107 F. (2nd) 689, the Circuit Court of Appeals for the 8th Circuit, 1939, reversed a judgment on the defendant's appeal which had been entered in favor of the plaintiff and remanded the case for a new trial. The plaintiff, a milkman, was injured as a result of falling on some grease on the floor of the defendant's premises. The case was submitted to the jury upon the charges that the defendant had knowledge of the unsafe condition and that it failed to warn the plaintiff of that condition. The trial court withdrew from the jury's consideration the charge that the defendant had negligently permitted grease to remain on the floor. The Circuit Court of Appeals found no evidence to sustain the charges of negligence which was submitted to the jury. The appellee argued that the judgment could be sustained on the charge of negligence which the trial court had withdrawn from the jury's considertaion. Circuit Judge Stone in the court's opinion held as follows:

> "It results from the foregoing that this judgment must be reversed and the case remanded for retrial. Appellee has argued that the court erred in withdrawing the first negligence pleaded, to wit, that the defendant negligently and carelessly 'caused—said grease—to be and remain on the floor' etc. Since the judgment was for appellee he could not have appealed therefrom. Also he cannot support the judgment by the argument that there was sufficient evidence to support a verdict in his favor because this would sustain recovery on a state of facts not only not passed on by the jury but expressly withdrawn from their consideration. In short the first ground of negligence has no place in determining this appeal. We determine the appeal entirely apart from such issue."

So in the instant case the Circuit Court of Appeals should have determined this case solely upon the issue presented to and passed upon by the jury and should have excluded any liability predicated upon the theory of independent contractor.

Conclusion.

From the foregoing reasons, it is respectfully submitted that a writ of certiorari should be allowed according to the prayer in the petition.

Respectfully submitted,

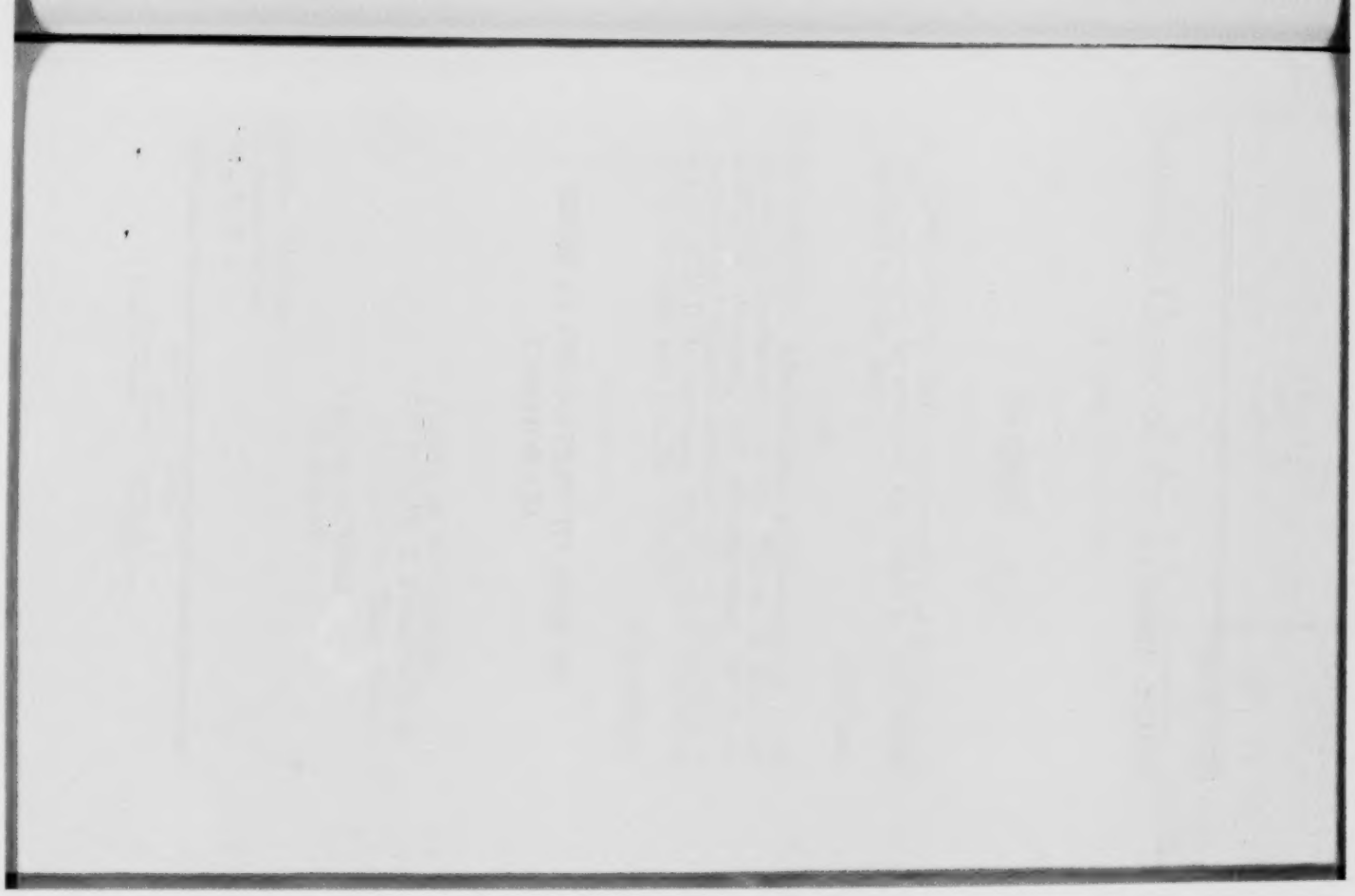
CHARLES A. ROONEY,

Attorney for Ross Motor Lines, Inc.,

Petitioner.

SAUL NEMSER,

Of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1940.

C. A. ROSS, AGENT, INC., a corporation of North Carolina, (amended by order of the Court to read ROSS MOTOR LINES, INC.),

Petitioner,

vs.

LOUIS VENUTO, Administrator *ad Prosequendum* and General Administrator of the Estate of ELVIRA VENUTO, deceased, and Administrator *ad Prosequendum* and General Administrator of the Estate of ANNA VENUTO, deceased, FLORENCE VENUTO, VITO CUOZZO and MARIE CUOZZO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorables, THE CHIEF JUSTICE *and* ASSOCIATE JUSTICES *of the Supreme Court of the United States:*

The respondents, Louis Venuto, administrator *ad prosequendum* and general administrator of the Estate of Elvira Venuto, deceased, and administrator *ad prosequendum* and general administrator of the Estate of Anna Venuto, deceased, and Florence Venuto, respectfully pray that the

petition of the Ross Motor Lines, Inc., petitioner herein, be dismissed and that a writ of certiorari be denied, on the following ground:

This Court in the exercise of its discretion should decline to grant a writ of certiorari.

Statement of the Case.

Ross Motor Lines, Inc., the petitioner herein, was engaged in the motor transportation business since May 8, 1936 and was lawfully authorized to and did operate as a common carrier between Gastonia, N. C. and New England points covering approximately eleven States (R. p. 125, supplemental appendix).

The Ross Motor Lines hired Robinson to haul freight for the company and it appeared that between January, 1937 and July 3, 1937 Robinson worked exclusively for the Ross Co. and was kept busy and occupied all of the time (R. p. 100, supplemental appendix).

It further appeared that on the day of the accident Robinson was hauling a load of Kress merchandise which the Ross Co. had contracted to ship for the Kress Company. The load of merchandise was covered by bills of lading issued by the Kress Company and were signed and receipted by Mr. Herman, dispatcher of the Ross Co., as having been received by the Ross Co. as a common carrier for shipment for the Kress Co. The bills of lading (P-9, P-11), set forth that the load was to be hauled over the route of the Ross Co. (R. p. 54, supplemental appendix; pp. 13 and 16, appellees' appendix).

The waybills or freight bills (P-9, P-39, P-11) covering the shipment hauled by Robinson were prepared by Mr. Herman on printed forms of the Ross Co. and carried the rates of the Ross Co. which were set forth in its tariff on file

with the Interstate Commerce Commission (R. p. 54, supplemental appendix; pp. 14, 15 and 17, appellees' appendix). It also appeared that Mr. Herman inserted the name of Robinson above the printed word "driver" in the lower left hand corner of the freight bills where the following printed language appeared,

> "Received above articles for delivery as shown C. A. Ross, Agent, Inc.
>
> By L. L. Robinson
> Driver."

and that Robinson signed his own name in the lower right hand corner where the following printed language appeared,

> "Received payment for the Company
>
> L. L. Robinson."

Mr. Herman also prepared a "manifest" (P-10) on the printed form of the Ross Co. covering the entire load carried by Robinson and inserted the name of Robinson in the upper right hand corner above the printed word "driver" (R. p. 55, supplemental appendix; p. 16, appellees' appendix).

The testimony further revealed that Robinson received instructions from Mr. Ross, president of the Ross Co., on his northbound trips (R. pp. 5 and 6, appellees' appendix) and took orders from Mr. Herman on his southbound trips (R. pp. 10 and 11, appellees' appendix). Mr. Herman always checked the freight carried by Robinson and helped to load Robinson's trailer on the day of the accident (R. p. 53, supplemental appendix).

It further appeared that the equipment owned by Robinson was leased to the Ross Co. as set forth in his application for authority to engage in business as a com-

mon carrier (R. pp. 11 and 12, appellees' appendix; p. 107, supplemental appendix); and that the equipment described in the Ross Co. application as having been leased by "others" to the Ross Co., was owned by Robinson (R. pp. 147 and 148, supplemental appendix).

The proofs at the trial further showed that Robinson had no tariff of his individual issue nor was he a party to any agency tariff filed with the Interstate Commerce Commission on or prior to the day of the accident (R. Exhibit P-33); and that Robinson had no insurance or other security to support his comomn carrier application on file with the Interstate Commerce Commission on and prior to the day of the accident (R. Exhibit P-34).

On page 3 of his brief counsel for petitioner states that the case involves a novel and important question and is of great moment because the insurance carrier of the original motor carrier would have imposed upon it vast and ruinous liabilities which it could not anticipate in fixing its rates. This, of course, was not the issue before the Court. And even if it was, the insurance carrier in assuming the risk of insuring a common carrier under the Motor Carrier Act, 1935, knew full well that its liability on the policy and endorsement which it was required to attach to its policy (Rules and Regulations of the Interstate Commerce Commission governing policies of insurance, page 7, form B. M. C. 31), was absolute in the event a judgment was recovered against the assured or any carrier it chose to hire in its work, if the judgment recovered resulted from the negligent operation, maintenance and use of motor vehicles under its certificate of public convenience and necessity issued to the assured by the Interstate Commerce Commission, regardless of whether such motor vehicles were specifically described in the policy or not.

On page 4 of his brief counsel for petitioner states that
bstantial rights of the Ross Co. were prejudiced at the
ial because the trial judge permitted testimony concern-
g rules and regulations of the Interstate Commerce
ommission and hence allowed evidence to be introduced
hich was outside the scope and issues of the pleadings.
These proofs were offered by the respondents to show
at the Ross Co. was a common carrier and had to abide
certain rules and regulations of the Interstate Com-
erce Commission with respect to bills of lading, freight
ls and the filing and posting of its tariff. The proof
s offered to indicate that the Ross Co., a common car-
r, was complying with these rules and regulations and
show that the company, in accepting the bills of lad-
and preparing the freight bills, was conducting its own
siness and prescribing its own rates as set forth in its
iff and not the rates of Robinson.

Because Robinson testified he was an independent con-
ctor, it was important to determine whether his rates
plied to the shipment in question, whether he filed or
blished any tariff and whether he had any bills of lad-
of his own in view of the strict requirements of the
erstate Commerce Commission relating thereto, so that
jury could determine whether or not Robinson could
fully engage in an independent business of his own
a common carrier.

Reasons for Denying the Writ of Certiorari.

The decision of the Circuit Court of Appeals for the
rd Circuit did not decide any question of local law
onflict with applicable local decisions and was well
nded upon the facts appearing in the record.

The decision of the Circuit Court of Appeals for the
rd Circuit did not decide any question of Federal Law.

3. The Circuit Court of Appeals for the Third Circuit did not depart from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's power of supervision.

ARGUMENT.

POINT 1.

The decision of the Circuit Court of Appeals did not decide any question of local law in conflict with applicable local decisions and was well founded upon the facts appearing in the record.

The Circuit Court of Appeals did not err in holding the Ross Co. liable for the negligent acts of Robinson because the Ross Co., a common carrier for hire in interstate commerce, could not relieve itself of liability by delegating to Robinson the performance of its duties which it assumed and for which it was hired by the Kress Company, even though Robinson was an independent contractor.

Where the evidence shows the relation to be that of independent contractor rather than master and servant, *ordinarily* there is no liability cast upon the one who has entrusted the work to an independent contractor, from negligence in its performance. We say *ordinarily* because of our confidence that the rule does not apply and should not apply in *common carrier cases.* Where work cannot be done except by virtue of some special privilege or franchise, the obligation (it is submitted) is non-delegable; and the torts of an independent contractor render the one so attempting to delegate, liable for the harm resulting.

Sec. 428, Restatement of the Law of Torts.

The following language appears in *26 Cyc. 1564 (111):*

> "Corporations have been held liable for the wrongful acts of independent contractors while they were exercising, with the assent of the corporation, some chartered power or privilege of the corporation, but the liability is limited to wrongs done in the performance of acts which could not have been done except for the existence of the charter of the corporation."

In the case of *Meola v. Howard Savings Institution* (Errors & Appeals) 109 N. J. L. 37, 160 Atl. 416, it appeared that the savings institution owned a lot of land adjoining the plaintiff's building and it contracted with Howie, a competent contractor, to excavate its lot for the foundation of a new building; that such excavation was for a depth of approximately 9 feet below the curb level; that as a result of doing that work, as the jury evidently found, the adjoining wall of the plaintiff's building settled and damage resulted. A judgment was rendered against the savings institution and it appealed. Justice Parker, speaking for the Court, said at page 417:

> "Nor does the rule of independent contractor protect the appellant. The general doctrine relating to employment of an independent contractor in cases where the work is not in itself a nuisance is well understood and needs no discussion here; *but there are several exceptions to the rule, and one of them is that, where the duty to the public or to an individual is imposed on a party by statute or ordinance, that party cannot escape liability by delegating the work to an independent contractor.* 39 C..J. 1337, and cases cited. Blount v. Tow Fung, 48 R. I. 453, 138 Atl. 52, Newman v. Pasternack, 103 N. J. L. 434, 438, 135 Atl. 877, 50 A. L. R. 482, in which this very statute was invoked. The duty of support, where license to enter has been given (xx), is an absolute one, and the question whether care has been used is, so far as the statute is concerned, wholly irrelevant. Hirschberg v. Flusser, 91 N. J. L. 66, 102 Atl. 353, affirmed 92 N.

J. L. 515, 105 Atl. 893. *The duty, being imposed by statute, cannot be delegated by the party on whom it is imposed, and, that being so, the independent contractor feature is no part of the case.* Hussey v. Long Dock R. R. Co., 100 N. J. L. 380, 126 Atl. 314."

See *Rizzi v. Ross* (Errors & Appeals), 117 N. J. L. 362, 189 Atl. 110.

Delaware, Lackawanna & Western Rd. Co. v. Salmon (E&A) 39 N. J. L. 299.

Topf, et al. v. West Shore & Ontario Terminal Co., (Supreme) 46 N. J. L. 34.

18 R. C. L. 792, Sec. 251.

The case of *Reisman v. Public Service* cited by counsel on pages 9 to 11 inclusive of his brief, is not applicable. The exhibition of fireworks was not part of the company's business. It was not necessary for the company to secure a *permit or license* to carry on this exhibition, and, therefore, it could not be argued that the company was the only one authorized to carry on this exhibition which was performed by the independent contractor. It clearly appeared that the company did not attempt to delegate any activity, which it was only privileged or licensed to do, to the independent contractor.

The other cases cited by counsel on pages 11 to 15 inclusive are neither controlling nor applicable to the case *sub judice*. Most of these cases involved persons or corporations not engaged in the trucking business, who required the services of truckmen to make deliveries for them. *None of these persons or corporations were common carriers* and there was no duty on their part to secure any license or franchise before being duly authorized to carry on the work or activity which resulted in injury or damage to the plaintiffs in those cases. The work performed by these truck-

men could have been carried on by anyone regardless of their status.

In the case *sub judice* the Ross Co. was the carrier and hired Robinson to carry on its business for which the Ross Co. was engaged by the Kress Co. The freight was covered by bills of lading issued by the Kress Co. and receipted by the Ross Co. The freight charges were prepared by the Ross Co. based on its tariff rates. A manifest was also issued and prepared by the Ross Co. covering the entire shipment being carried by Robinson.

We respectfully submit that the Ross Co. would be liable even though Robinson was an independent contractor. Since the law compels carriers to carry public liability insurance for the protection of the public, it would certainly be a tragedy if carriers were permitted to hire irresponsible truckers to haul for them and upon the happening of an accident, be permitted to raise the defense of independent contractor. Under such circumstances how could the public be protected? The carriers could not have lawfully engaged in hauling if it were not for the authority granted them by the Interstate Commerce Commission, and, quite likely, such hired truckers in many cases would not carry public liability insurance which is required of licensed carriers. If such a defense would be permitted the carriers under such circumstances, it would be a fraud upon the public and the Government.

In the case of *Liberty Highway Co., et al. v. Callahan, et al.* (Court of Appeals—Ohio), 157 N. E. 708, reversed on other grounds, it appeared that suit was brought against Griffith whose truck, drawing a trailer (owned by defendant), was being operated by Harry Culver, an agent and employee of defendant Griffith. Griffith was operating a truck which he owned and a trailer which he rented from the defendant, Liberty Highway Co., at a cost of $7.00

per day under an arrangement with the Liberty Highway Co. for which he was to receive 68% of the charge for freightage and the Liberty Highway Co. would receive 32%. The charges on freight hauled by Griffith were collected by the Liberty Highway Co., which solicited the business and maintained freight docks.

The contention was made by the Liberty Highway Co. that the court should have directed a verdict in its favor on the theory that Griffith was not its agent or employee but that he was an independent contractor. The court held:

> "There is evidence, however, tending to show that the Liberty Highway Co. was a common carrier of freight and made the arrangement with Griffith to assist it in performing its public duty as a common carrier. We believe the correct rule to be that a corporation, which is engaged as a common carrier of freight by motor truck, and holds itself out as such to the public, cannot delegate the carrying of the goods upon the public highway by truck to a third party so as to relieve itself from responsibility for negligent acts committed in the performance of its duties as a common carrier under its charter. Public policy requires that a corporation chartered to perform the public duties of a common carrier should not be permitted to contract with parties who may be irresponsible for the performance of a part of its duties under the charter and thus avoid responsibility for the negligent performance thereof. The duties of the corporation thus chartered are nondelegable; and it is answerable for the negligent acts of persons to whom it entrusts the performance of a part of its duties, if such acts are done by them in the performance of such duties and while acting within the scope of agreement for carriage. For the reasons indicated we think that the Liberty Highway Co. was not entitled to a directed verdict."

Cites 28 A. L. R. 190, Point 3, Section 24.

The following cases support the Liberty Highway Co. case, *supra*, and illustrate the theory that a common carrier

cannot relieve itself of liability by entrusting the performance of its work to an independent contractor.

Stickel v. Erie Motor Freight Inc. (May 18, 1936), 6 N. E. (2nd) 15, 54 Ohio App. 74;
Bates Motor Transport Lines Inc. v. Mayer (April 8, 1938), 14 N. E. (2nd) 91, 213 Ind. 664;
Swallow Coach Lines Inc. et al. v. Cosgrove (May 31, 1938), 15 N. E. (2nd) 94, 214 Ind. 532;
Duncan v. Evans (see Healy case below):
Healy v. Universal Carloading & Distributing Co., 17 N. E. (2nd) 913, 134 Ohio St. 486 (November 30, 1938), aff. 20 N. E. (2nd) 729, 60 Ohio App. 265;
Gas City Transfer Co. Inc. v. Miller (Indiana) June 13, 1939, 21 N. E. (2nd) 428;
Zifrin v. Bolitho (Ind.), 25 N. E. 2nd 679.

We respectfully submit that the decision of the Circuit Court of Appeals was not in conflict with the applicable decisions of New Jersey or deeply rooted precedence in the common law.

POINT 2.

The decision of the Circuit Court of Appeals did not decide any question of Federal law.

The suit herein was based on an ordinary negligence action. The Court did not, by its decision, decide any question of Federal law. In referring to the Motor Carrier Act, 1935, in its opinion, the Court pointed out that interstate motor carriage is now regulated by elaborate rules and regulations set out in the Act to indicate that certain requirements must be met before entitling persons or corporations to secure authority or a franchise to so operate.

We seriously questioned, at the trial, Robinson's authority to operate as a common carrier because of his failure to carry and file a policy of insurance with the Commission and the fact that he failed to file any tariff with the Commission to enable prospective shippers to determine whether or not his charges were proper and whether or not he was adhering to the rates set forth therein. We cannot, therefore, assume that Robinson was possessed of the necessary financial responsibility to perform his work as a common carrier as pointed out by counsel on page 17 of his brief.

As a matter of fact Robinson did not have any certificate from the Commission to operate as a common carrier but had merely filed an application for authority to act as a carrier. In order to be entitled to lawfully operate as such, it was necessary for him to meet the requirements of the Act, namely, to carry and file insurance and file a tariff with the Commission. This he failed to do (R. Exhibits P-33 and P-34).

Counsel points to the fact that in the *Duncan v. Evans* case on page 16 of his brief, the operator of the hired truck was not authorized and bonded as required by State law. In the companion case of *Healy v. Universal Carloading & Distributing Co.*, 134 Ohio State 486, 17 N. E. (2) 913, the Court held the initial carrier responsible even though the hired carrier had complied with the law in every respect.

POINT 3.

The Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's power of supervision.

The facts in the case *sub judice* were fully developed at the trial and the verdicts rendered therein were within the

scope of the pleadings and the Court sustained those findings on a theory which the respondents requested the trial court to submit to the jury at the trial but which the trial judge refused to do (R. bottom p. 7, Opinion).

We believed that there was an abundance of evidence establishing the relationship of master and servant in the case.

American Carrier Corp. v. Avigliano, et al., 123 N. J. L. 490, 9 A(2) 788;
Scarano v. Lindale & Victor Lynn Transportation Co., 121 N. J. L. 549, 3 A(2) 633;
Western Express Co. v. Smeltzer, (C. C. A.—6th Circuit), 88 F(2) 94;
Interstate Motor Freight Corp. v. Beecher (Ohio), 174 N. E. 27;
Laughlin v. Michigan Motor Freight Lines, 276 Mich. 545, 268 N. W. 887;
Mann v. Reliable Transit Co., et al., 217 Wisc. 465, 259 N. W. 415;
Hazard v. Great Central Transportation Corp., 270 Mich. 60, 258 N. W. 210;
Horowitz v. Daily Mirror Inc. et al., 258 N. Y. S. 39, 144 Misc. 69;
Yelloway Inc. v. Hawkins, (C. C. A.—8th Circuit).
38 F (2) 131

Nevertheless the result in the case *sub judice* can be sustained on the basis that the Ross Co. was engaged in the type of business wherein the negligence of a person employed by the company as an independent contractor is a matter for which the company is made responsible.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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(20)

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940.

No. 1016. 69

C. A. ROSS, AGENT, INC., a corporation of North Carolina, (amended by order of the Court to read ROSS MOTOR LINES, INC.),

Petitioner,

vs.

LOUIS VENUTO, Administrator ad Prosequendum and General Administrator of the Estate of ELVIRA VENUTO, deceased, and Administrator ad Prosequendum and General Administrator of the Estate of ANNA VENUTO, deceased, FLORENCE VENUTO, VITO CUOZZO and MARIE CUOZZO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF

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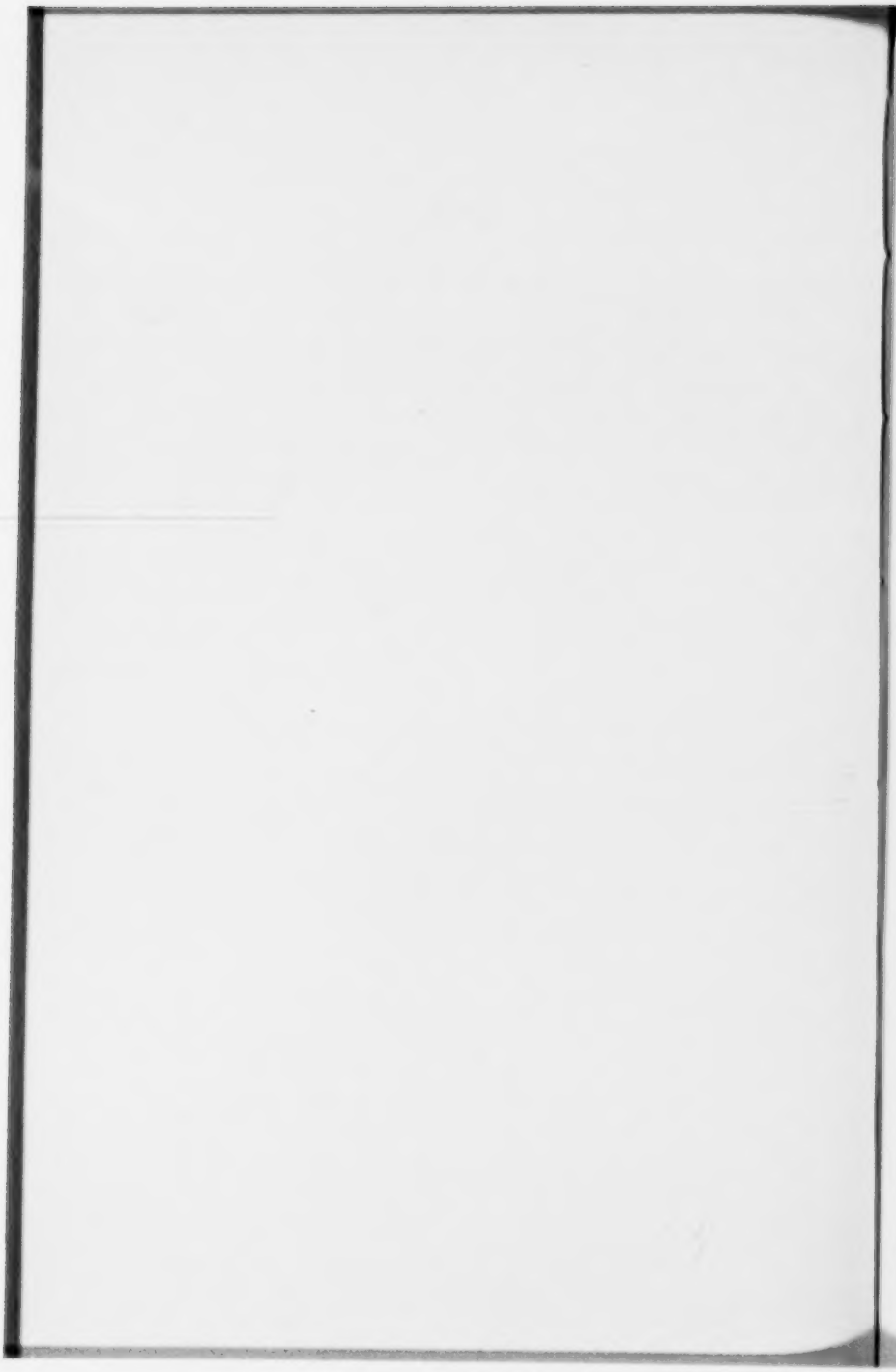

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49 U.S.C.A. 312; 49 Stat. 555; 49 U.S.C.A. 322; 49 Stat. 564 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 1016.

C. A. ROSS, AGENT, INC., a corporation of North Carolina, (amended by order of the Court to read ROSS MOTOR LINES, INC.),

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF

Statement

Stress is laid in the brief of the respondents upon the alleged failure of the defendant, Robinson, to comply with certain provisions of the Motor Carrier Act, 1935. This contention is without merit. We are here definitely dealing with two authorized carriers. Robinson was operating under authority of the "Grandfather" clause of the Motor

Carrier Act, 1935 (49 U.S.C.A. 306; 49 Stat. 551 and 49 U.S.C.A. 309; 49 Stat. 552), by filing his application in full compliance with the requirements of the act (Exhibit D-7, p. 178, Supplemental Appendix). He had also filed tariffs (Exhibit D-12, pp. 183 to 187, Supplemental Appendix). This was a joint tariff with C. A. Ross, Agent.

The bare statement in the respondents' brief and Exhibits P-33 and P-34 that individual tariffs had not been filed nor that an agency tariff had not been filed, does not set up a full disclosure as to the contents of the records of the Interstate Commerce Commission, in view of the certified copies of the Robinson filed tariffs, which were offered in evidence. Robinson also carried his own liability insurance (Exhibits D-9 for identification and D-10 for identification, p. 182, Supplemental Appendix). The failure to file these policies prior to the accident, did not deprive him of his operating rights but merely subjected him to any disciplinary action which the Commission might impose (Motor Carrier Act, 1935, 49 U.S.C.A. 312, 49 Stat. 555; 49 U.S.C.A. 322, 49 Stat. 564), nor did it impose upon the defendant, Ross, any greater burden or liability.

Where a statute prescribes a penalty for a violation of its provisions and gives no right of action to any person who may be injured by a violation, such a violation does not give rise to a cause of action.

Herod vs. *Mutual Chemical Co. of America*, 115 N. J. Law 369; 180 Atl. 432, where the Court of Errors and Appeals of the State of New Jersey held that an injured employee could not take advantage of the failure of an employer to file a report where the Workmen's Compensation Act provided merely a penalty for the failure of the employer to file the required report.

See also: *Rupp* vs. *Burgess*, 70 N. J. Law 7; 56 Atl. 166.

The record is bare of any action taken by the Commission against Robinson, or any effort by the Commission to impose any additional burden upon Ross for the conduct of Robinson.

It is respectfully submitted, therefore, that a writ of certiorari should be allowed according to the prayer in the petition.

Respectfully submitted,

CHARLES A. ROONEY,
Attorney for Ross Motor Lines, Inc.,
Petitioner.

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Of Counsel.